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In the Supreme Court of the United States

October Term 1954

No. ~~171~~ 6

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. ~~172~~ 7

UTAH POULTRY & FARMERS COOPERATIVE, ARMOUR AND COMPANY, AND SWIFT & COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. ~~202~~ 11

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. ~~203~~ 12

UTAH POULTRY & FARMERS COOPERATIVE, ARMOUR AND COMPANY, AND SWIFT & COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

EDWARD M. REIDY,
Chief Counsel, Interstate Commerce Commission,
ALLEN CRENSHAW,
Associate Chief Counsel,
Counsel for Appellees, Interstate Commerce Commission.

In the United States District Court for the District of Utah, Central Division

Civil Action No. C8–53

UTAH POULTRY & FARMERS COOPERATIVE, PLAINTIFF
THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee, the Interstate Commerce Commission, moves that the judgment of the District Court be affirmed.

This is a direct appeal from a final decree entered May 7, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing complaints seeking to set aside a Commission order. The several petitions for appeal, the orders allowing appeal, and citations issued thereunder, all on May 7, 1954, refer to the "final order and decree" of the District Court entered on March 10, 1954, which is the date on which the

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District Court opinion was entered. Under the circumstances it is here understood and accepted that the appeal is from the final decree entered May 7, 1954.

Proceedings here involved were instituted by Division 2 of the Commission on its own motion. This action followed the filing of tariffs by the railroads providing an amendment or substitute for the prior established tariff rules and regulations governing descriptions, marks, inspection, and delivery of eggs, in all territories, and the handling of claims thereunder. The prior rule was established in 1919, pursuant to Commission findings in *National Poultry, Butter & Egg Asso.* v. *N. Y. C. R. Co.*, 52 I. C. C. 47, decided July 21, 1919. That regulation and rule was established to govern settlement of claims for loss of or damage to shell eggs. A special rule limited to Boston, New York, and Philadelphia was cancelled on February 10, 1941, and the general rules, based upon the Commission's findings in the above-entitled proceedings, were made applicable throughout the United States. The complainant to the Commission in the 1919 proceeding was the National Poultry, Butter & Egg Association, an organization with a membership of some 900 persons, firms, or corporations distributed throughout the United States. Exceptions to the Examiners' proposed report in instant proceedings were filed by National Poultry, Butter & Egg Association. The report herein states, 284

I. C. C. 377, 379, that since amending the prior rules, February 10, 1941, they had not been basically changed until June 24, 1948.

The proceeding herein was for the purpose of investigating the reasonableness and lawfulness of special regulations governing inspection and delivery and the handling of claims, in connection with transportation of shell eggs in interstate commerce within the United States, with a view of prescribing rules, regulations, and practices relative to such transportation. The immediate reason for the investigation was the filing of tariff rules and regulations, respecting loss and damage to shell eggs transported by railroads, filed July 24, 1948. The Commission declined to suspend that tariff, but instead instituted the investigation here involved.

Hearings were held July 26, 27, 1949, at Chicago, Ill., December 15, 1949, at Brooklyn, N. Y., February 8, 1950, at Washington, D. C., August 1, 1950, at Los Angeles, Calif., and September 7, 1950, at Chicago, Ill. Appellants herein participated in the hearings and submitted testimony of witnesses and exhibits. The Examiners filed a proposed report April 25, 1951, to which the National Poultry, Butter & Egg Association, and others including appellants herein filed exceptions. The report of the Commission in *Special Regulations, Eggs,* was decided February 4, 1952, 284 I. C. C. 377. During the hearings respondent railroads filed schedules to become effective May

12, 1950, proposing certain changes in the special regulations then being considered. Upon protest the proposed schedules were suspended by order of Division 2, dated May 11, 1950, effective for seven months thereafter under provisions of Section 15 (7) of the Interstate Commerce Act, 49 U. S. C. 15 (7). Respondents voluntarily continued the suspension until April 11, 1952, after the Commission report was entered February 4, 1952. Proceedings in the suspension case were consolidated with, considered, and decided in the report of February 4, 1950.

The Commission report carefully considered the facts contained in the 1,254-page transcript of testimony, the 60 exhibits, and the background of prior consideration of the subject in other proceedings involving rules and regulations governing claims of loss or damage to eggs transported by railroads. The tariff regulations prior to July 24, 1948, the existing regulations under the proceedings, and the proposed regulations, which were suspended, are set forth in full in Appendices A, B, and C of the report. The prior regulations had been in effect generally for almost thirty years before the new regulations became effective in 1948. The proposed tariff regulation of 1950 never became effective, because of Commission suspension and disapproval of its rules, providing 4 percent tolerance on eggs packed at rail points, and 6 percent on eggs packed at other

points. That tariff was cancelled by the order entered under the report of February 4, 1952.

The provisions of those three regulations of particular importance in this proceeding relate to the inherent damage attached to all eggs which exists prior to the transportation or resulted therefrom during the transportation, referred to as "tolerance." It is considered by the carriers, shippers, and others concerned as a damage or loss inherent in eggs and not caused by the transportation. Under prior regulations, Appendix A, Section 6, page 404 of the Commission report, it was provided:

> SECTION 6. In connection with shipments of eggs, except storage packed eggs, storage packed dirties, and rehandled and repacked eggs, if not more than five percent (5%) of the eggs are damaged, no claim will be allowed. Where damage exceeds five percent (5%), claims shall be allowed for all damage in excess of five percent (5%) if investigation develops carrier's liability.

Under the regulations investigated in this proceeding, Appendix B, Section 6, page 406, of the Commission report, it was provided:

> SECTION 6. In connection with shipments of eggs, except storage packed eggs, storage packed dirties, and rehandled and repacked eggs, if not more than five percent (5%) of the eggs are damaged, no claim will be allowed. Where damage exceeds five percent (5%), claims shall be allowed

for all damage in excess of five percent (5%) if investigation develops carrier's liability.

Under the proposed regulations, suspended and disapproved by the Commission, Appendix C, Sections 6 and 7, pages 407, 408 of the Commission report, it was provided:

> SECTION 6. On eggs placed in packages at rail point of origin of the shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 4% of the contents of the packages containing damaged eggs. Where damage exceeds 4%, claims shall be allowed for all damage in excess of 4% if investigation develops carrier liability.
>
> SECTION 7. On eggs placed in packages at points other than the rail point of origin, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 6% of the contents of the packages containing damaged eggs. Where damage exceeds 6% claims shall be allowed in excess of 6%, if investigation develops carrier liability.

Exceptions to each of Sections 6 and 7 provide for acceptance of certificates of Federal or State egg inspections showing damage at point of rail origin, at the amount of damage plus 1 percent, where actual damage shown is other than 3 percent under Section 6, and is other than 5 percent under Section 7. As noted in the Commission report, p. 380, the prior regulations effective July

15, 1919, reflected the findings in *National Poultry, Butter & Egg Assn.* v. *N. Y. C. R. Co., supra.* That finding was to the effect that a tariff rate applied to shipments of "current receipts or rehandled current receipts," providing that claims for broken eggs will not be considered or paid by carriers, where such eggs in any crate or case is not in excess of 5 percent of the contents, was not unreasonable or unlawful.

These rules providing a "tolerance" on claims of damage to eggs transported by railroads have been in effect for more than thirty years without court attack, by direct action or in review of Commission orders of approval, until the action herein was filed January 21, 1953. That prior acceptance of the tolerance rules for all those years is enough to refute the claims of appellants herein, that the proposed and cancelled regulations are, or were an attempt to avoid or limit railroad liability for damage, prohibited by Section 20 (11) of the Interstate Commerce Act, 49 U. S. C. 20 (11). It must be legally correct that if the regulations here proposed in 1950, could be conceived as a limitation upon damage caused by carrier transportation, the same rule of law necessarily applies to the prior thirty-year regulations, which were similar in detail except for difference in amount of tolerance and in the scope and method of application. Acceptance by these appellants of the tolerance provisions in prior regulations, constitutes a very grave con-

cession on their part that the regulations here under attack are not violative of said Section 20(11).

The question raised in the first paragraph of appellants' jurisdictional statement, as to whether or not the opinion of the court below was a "judgment, order, or decree," from which appeal could be taken, has been resolved by the filing of the final decree on May 7, 1954, the date upon which appeal was allowed. Appellee Commission has hereinabove conceded that the appeal has been taken from the final court decree. It is also conceded that the Department of Agriculture and other agencies of government participating in the action below, in opposition to the Commission order, have the right of appeal herein if they so desire. It is submitted that participation of such agencies in opposing this order, as stated in the opinion below "are entitled to no more weight and consideration than are the same claims in the complaint of private parties." This opinion ruling is based upon the opinion statement:

> The Interstate Commerce Commission is vested with the only legal authority to administer the Interstate Commerce Act. It has exclusive authority in this field. Neither the Department of Agriculture, Department of the Army, or the Department of Justice (or all of them) has any authority superior to the Commission to decide for the government the questions raised by this action.

The opinion also held that the Attorney General does not have authority to "confess error" and thereby "to dispose of this action," citing 28 U. S. C. 2323, which provides for intervention of the Commission in such cases, and that "The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein."

It is beyond question that matters involved in this proceeding relate to application of the Interstate Commerce Act, and that administration of that Act is vested in the Commission by Congress. That provides conclusive authority for the ruling of the court below that only the Commission has legal authority to administer the Interstate Commerce Act. The Commission would be powerless to administer the Act if other Government agencies were permitted to oppose its orders, with the force of Government authority and to the point of overruling the action. The ruling of the court below that claims of departments of government, other than the Commission in dealing with the Interstate Commerce Act, are entitled to no more consideration than claims of private parties, is clearly supported by opinions of the Supreme Court. This was plainly stated in *Interstate Commerce Commission* v. *Jersey*

City et al., 322 U. S. 503, 523. The Attorney General took a neutral position in the District Court, and filed brief, on appeal urging the decree setting aside the Commission order be affirmed. The opinion states:

> * * * *If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so,* but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals. [Emphasis supplied.]

Three basic questions were here presented to and decided by the Commission. The first was, whether or not there are inherent defects in eggs, other than so-called current receipts. Second, were those inherent defects responsible for damage to eggs at the time of shipment and in transit, in percentages approved by the report of February 4, 1952. And third, was there substantial record evidence to support the subordinate and ultimate findings in the report.

Appellants do not contend that the Commission has no authority to investigate the carrier regulations here involved, or to decide the reasonableness and otherwise lawfulness thereof. They contend only that the decision of the Commission, that shell eggs are subject to inherent damage, not caused by the carriers, in the percentage

amounts stated in the findings, constitutes approval of tariff regulations which limits liability contrary to provisions of Section 20 (11) of the Interstate Commerce Act, 49 U. S. C. 20 (11). That section provides that railroads shall issue bills of lading or receipt for property to be transported, "and shall be liable to the lawful holder thereof for any loss, damage, or injury * * * caused by it or by any common carrier * * * to which such property may be delivered or over whose lines such property may pass * * *."

In the jurisdictional statements, p. 5, it is stated that prior to July 24, 1948, there was no limitation upon railroad liability for damage to shell eggs other than "current receipts," with respect to which the Commission approved a tariff rule, in 1919, limiting carrier liability on shipments of "current receipts" to damage in excess of five percent of the total number of eggs, citing *National Poultry, Butter & Egg Asso. et al. v. N. Y. C. R. Co., supra.* The statement claims the basis for the Commission's 1919 decision was the "assumption that the shippers ordinarily pack into cases of 30 dozen eggs [current receipts] approximately 18 broken or damaged eggs." The Commission report, p. 49, preceded the selected quote, with the statement "What is called the 5 percent rule rests upon" the assumption quoted. That report, pp. 53, 54, referred to Department of Agriculture reports filed in the record, showing

results of a study of conditions under which eggs were shipped in 1913, including the condition of eggs found when prepared for shipment at 12 packing houses. As the reports revealed, upon the basis of sample cases checked, each case contained an average of 19.2 cracked eggs and 11.28 eggs with checks or abnormally thin-shell areas. On the basis of that Department of Agriculture evidence the report held "if it be true that the average case packed for shipment contains 19 cracked eggs before it starts on its railroad journey, allowance for at least that number when delivered to consignee is justified." Upon that evidence the tariff rule applied to shipments of current receipts, that "claims for broken eggs will not be considered or paid by the carrier when the number of broken eggs in any case or crate is not in excess of 5 percent," was found not to be unreasonable or unlawful.

During the some thirty years that tariff remained in force and effect the National Poultry, Butter & Egg Association, the Department of Agriculture, the defense departments of Government, Swift & Company and Armour & Company, never attacked that rule or Commission approval thereof in court or otherwise, as a limitation upon carrier liability for loss or damage of shipments transported. That rule was as certainly based upon the nature of eggs—inherent defects—as are the regulations here in controversy. By use of fragmentary consideration of facts and Commis-

sion reports, appellants apparently seek to reconcile their acceptance of the 1919 tariff rules with their opposition to the rules in the tariffs here involved. All of the legal and logical juggling by appellants will not suffice to convince nonpartisan interests that there is any material difference between the 1919 and 1950 regulations, insofar as the questions of inherent defects and limitation of carrier liability are concerned.

Appellants herein participated in the Commission proceeding and offered testimony of witnesses and exhibits. The opinion below quotes from some of the testimony. On page 9, Witness Hamann, Chief Inspection and Grading Division of the Department of Agriculture, in answering a question of the hearing Commissioner, stated "there is a tolerance in the grading of eggs, * * * because it is not humanly possible to remove from any lot of eggs in the candling or grading process all defective eggs." Testimony of this witness is further quoted, opinion, p. 10, to the effect that he had never seen a perfect car (of eggs), and that there is a normal expectancy of shell damage in every car that is loaded. The opinion, pp. 10, 11, refers to the testimony of Mr. Miller, chief of the research division, poultry branch, Department of Agriculture, as to the results of a test study made at the request of the Interstate Commerce Commission. He stated that farm eggs when delivered to a packer show 5 percent in a checked condition, 4 percent existing before leaving the

farm and 1 percent more in transit to the packer, and in addition 12 percent more with shell damage consisting of stains and dirties. He also stated that after being reworked at the packing plant, at the time of leaving the shipping point the eggs showed 1.9 percent checks, 1.4 percent stains and dirties, a total of 3.3 percent (damaged). This witness submitted exhibit 22, p. 2, showing the result of studies of 737 cars selected at random, showing total defects of 3.9 percent.

The opinion, p. 12, noted other evidence submitted by the railroads, the results of examination of 1,002 origin inspection certificates of the Department of Agriculture, based upon 18,437 cases of eggs examined at the shipping point, showing 3.04 percent of natural eggs (before being dipped in oil) to be checked or stained, and for processed eggs 3.22 percent with same type of damage. A large volume of evidence showing the inherent damage to eggs is in the record herein, only portions of which have been quoted in the opinion. It is not reasonable to quote or refer to more of that evidence herein, since that quoted above not only supports the Commission and Court findings, but proves beyond doubt that shell eggs when shipped have inherent defects and damage not discoverable by normal packing plant processes, and not caused by the carrier. As noted by the opinion, the Commission found, report, p. 403, that tolerances of 3 percent at rail points of origin, and 5 percent at other than the

rail points, would be reasonable. The existing 5 percent tolerance on eggs, other than rehandled and repacked is practically the same regulation which has been applied for some thirty years, and that was found reasonable.

The opinion noted that carrier studies of Department of Agriculture inspection certificates was substantiation of the Department's study made at the request of the Commission. It is not remarkable but only natural that the Commission findings are practically the same percentage, for rail points of origin, as were found by experts of the Department of Agriculture. It is remarkable only that counsel for that department claim herein that no evidence supports the finding as to the 3 and 5 percent tolerance. In practical effect the 5 percent tolerance has been accepted by the Department of Agriculture and shippers generally for so many years as to here make the claim in respect to that tolerance unworthy of serious consideration. The tolerance percentage at rail points of origin had not been previously determined. That is the 3 percent tolerance approved by the Commission largely upon the basis of evidence submitted by Department of Agriculture experts. The jurisdictional statement, p. 15, claims there is no evidence or finding, as to eggs packed at rail origins, that damage found at destination existed prior to transportation by rail. This method by the Department of Agriculture of trying to avoid the force of the testi-

ony of their own experts, without plainly stating disagreement with them, cannot divert attention from the obvious fact that those experts testified as to egg damage appearing in cases ready for shipment at the rail point of origin. It was clearly the purpose of the Commission to establish the inherent damage existing after packing and before shipment. That was the reason for requesting a study by experts of the Department of Agriculture. The findings in the report, pp. 402, 403, fully refute appellant claims as to lack of findings, to such extent as to need no further comment. *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216.

The opinion below, p. 14, *et seq.*, gave full consideration to "Experience with Tolerance Rules." Court and Commission cases are there cited, showing application of tolerance rules, similar to those here involved, on natural shrinkage of grain, on moisture evaporation or precipitation on coal, on watermelons, and others, including eggs, as above discussed. Interpretation of Section 20 (11), pp. 16, 17, clearly shows there was no purpose in that statute to make a carrier liable for loss or damage "not caused by it." In support thereof there is quoted, p. 17, a full explanation by the Supreme Court of the meaning of Section 20 (11), taken from *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 503, 506-507. The jurisdictional statement of appellants, p. 12, cites the *Adams Express case* as authority for

the contention that "The majority of the Court in this case misconstrued the phrase 'caused by it' in Sec. 20 (11) * * *." This fairly illustrates the misconception of appellants as well as the inapplicability of judicial authorities cited.

Probably due to inadvertence the jurisdictional statement, p. 12, admits there is an exception to the common law rule as to damage caused by "inherent vice or the nature of the goods," but claims it has no application here. The statement says the exception relates to loss or damage where the carrier is free from negligence and the damage arises solely from "the nature and inherent character of the property, * * *." One must wonder that appellants do not realize that the exception recognized by them is precisely the basis on which Courts and the Commission have approved exemption from liability of a carrier for damage not "caused by it." As the opinion below held, this order of the Commission does not relieve the carriers from damage to eggs caused by them, but only from that "inherent damage" which existed at the time and origin of the shipment.

The Commission has here determined the reasonableness of a tariff regulation filed by the railroads, which seeks to relieve them of the payment of a minor percent of enormous damage claims on shipments of shell eggs. They contend that a relatively minor part of such claims is due to the inherent character of eggs and exists at the time of receiving shipments. The carriers claimed

that damage was 4 to 6 percent. After extensive hearings and long and careful consideration the Commission decided there is in fact existing damage at the time shipments are delivered to carriers, but that the amount thereof is 3 and 4 percent, subject to modification where Federal or State inspection agencies show the amount of actual damage. The application of the tariff is nationwide, and as permitted by the ultimate report finding, has been in effect for some two years.

The opinion below cites and quotes from a number of Supreme Court cases, as authority for the holding that "This is a question of fact relating to the application of the provisions of the Act, which legally can be decided only by the Commission and when so decided with substantial support of record evidence will not be disturbed by the courts." Among the cases there cited are, *I. C. C.* v. *Union Pacific R. R.*, 222 U. S. 541, 547–548; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546–548; *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, 665–666; and *New York et al.* v. *United States*, 331 U. S. 284, 328. Without doubt the Commission has here exercised its statutory authority according to standards established by

the cited opinions of the Supreme Court. The opinion below most carefully considered the Commission procedure, the evidence of record, and the report and findings therein. As there held, the findings are within the authority of the Commission, are adequate, and are supported by substantial evidence.

Appellants have contended that the regulation should apply only to localities where exorbitant claims of damages to eggs were filed and collected. They claim it unfair to apply the regulation nationwide, since shippers who do not make exorbitant claims would be subject to the tariff limitation. That contention is fully disposed of by the opinion below, p. 8, where it was stated:

> It is not unjust to apply the regulation nationwide. A shipper whose eggs suffer no damage is not hurt. The tolerance applies only if there is damage. If throughout the nation relatively small claims of damage were made by some shippers it would follow that there would be comparatively small or insignificant reductions under the regulation. And, it is a reasonable assumption from the Commission's exhaustive factual studies that generally some amount of damage was in the crates at the time they were delivered to the carrier.

CONCLUSION

For the foregoing reasons we submit that the decision below is clearly correct, that the Commission order is lawful in every respect, and that this appeal presents no substantial question. The decree of the District Court should accordingly be affirmed.

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